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7 **UNITED STATES DISTRICT COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA**
9 **SOUTHERN DIVISION**

11 MICHAEL G. DAVIDSON, an
12 individual,

13 Plaintiff,

14 v.

15 MANUFACTURERS and
16 TRADERS TRUST COMPANY,
17 d/b/a M&T BANK, a New York
Corporation; and BAYVIEW
LOAN SERVICING LLC, a
Delaware Limited Liability
Corporation;

18 Defendants.

19 CASE NO.:

20 **COMPLAINT FOR DAMAGES AND**
EQUITABLE RELIEF:

- 21
- 22 **1. BREACH OF CONTRACT**
2. VIOLATIONS OF THE FAIR DEBT
COLLECTION PRACTICES ACT
3. VIOLATIONS OF THE ROSENTHAL
FAIR DEBT COLLECTIONS
PRACTICES ACT
4. VIOLATIONS OF THE TRUTH IN
LENDING ACT (“TILA”)
5. VIOLATIONS OF THE REAL
ESTATE SETTLEMENT
PROCEDURES ACT (“RESPA”)
6. DEMAND FOR ACCOUNTING

23 **DEMAND FOR JURY TRIAL**

24

25 Plaintiff MICHAEL G. DAVIDSON (“Plaintiff”) brings this action against
26 Defendants, Manufacturers and Traders Trust Company d/b/a M&T Bank and
27

28

29 **COMPLAINT FOR DAMAGES AND EQUITABLE RELIEF**

1 Bayview Loan Servicing, LLC (collectively referred to as "Defendants"), and allege,
2 on information and belief (except as to those allegations relating to Plaintiff, which
3 are asserted on personal knowledge), as follows:

5 **INTRODUCTION**

- 6 1. This case challenges Defendants' outrageous conduct in servicing the home loan
7 of Plaintiff Michael G. Davidson.
- 9 2. Because Plaintiff lost his job he fell behind on his mortgage. Defendants offered
10 Plaintiff a permanent loan modification which he timely accepted.
- 12 3. Defendants have accepted payments on the modified mortgage for several months
13 but misapplied his funds and treated the loan as if it were in default.
- 14 4. This action seeks actual and statutory damages for unfair debt collection and
15 unlawfully unfair and bad faith conduct in the handling of Plaintiff's loan.

17 **JURISDICTION AND VENUE**

- 18 5. Subject matter jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331 and
19 1337 as the action arises under the laws of the United States.
- 21 6. Personal and subject matter jurisdiction is conferred on this Court pursuant to the
22 provisions of Section 84(c)(2) of Title 28 of the United States Code and Section
23 1331 of Title 28 of the United States Code because this proceeding arises under
24 the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA), the
25 Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601, *et seq.* ("RESPA"), the
26
27

Truth in Lending Act, 15 U.S.C. §§ 11601, *et seq.* (“TILA”), the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (“FDCPA”).

7. The Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1337.
 8. Venue and jurisdiction are proper in this District pursuant to 28 U.S.C. § 1339 as Plaintiff resides in this District, the property that is the subject of this action is situated in this District, and a substantial part of the events or omissions complained of occurred in this District.

PARTIES

9. At all times mentioned herein, Plaintiff MICHAEL G. DAVIDSON is an individual who resides in the County of Orange, State of California.
 10. Plaintiff is a natural person who residing in the County of Orange, State of California and is obligated or allegedly obligated to pay a debt and is a “consumer” as that term is defined by 15 U.S.C. § 1692a(3).
 11. Plaintiff is a natural person from whom a debt collector sought to collect a consumer debt which was due and owing or alleged to be due and owing from Plaintiff and is a “debtor” as that term is defined by California Civil Code § 1788.2(h).
 12. Plaintiff is a “borrower” within the meaning of 12 U.S.C.A. § 2605 of a federally regulated loan which is secured by a 1- to 4-family residential property as

1 defined by 12 C.F.R. § 1024.5(a)-(b).

2 13. Plaintiff is a “borrower” within the meaning of 12 U.S.C.A. § 2605 of a federally
 3 regulated loan which is secured by a 1-to 4-family residential property as defined
 4 by 12 C.F.R. § 1024.5(a)-(b) because Plaintiff’s Loan was originated by non-
 5 party Washington Mutual Bank, FA, who was a Federal Savings Bank, as
 6 described in the Deed of Trust securing the Subject Property, dated October 5,
 7 2006, and signed by Plaintiff. (See **Exhibit A**-Plaintiff’s Deed of Trust secured
 8 by the Subject Property).

9 14. Defendant MANUFACTURERS AND TRADERS TRUST COMPANY d/b/a
 10 M&T BANK (“M&T” or “Defendant M&T” hereinafter), is a New York
 11 Corporation engaged in servicing federally related mortgage loans secured by real
 12 property throughout the United States and the State of California. Among other
 13 business activities, M&T acts as a mortgage servicer managing and administering
 14 mortgage loans on behalf of mortgage investors who participate in the secondary
 15 mortgage market. M&T is subject to specific federal laws and administrative
 16 regulations governing its mortgage servicing activities. These laws include, but are
 17 not limited to, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*
 18 (hereinafter RESPA) and implementing Regulation X, (12 C.F.R. Part 1024),
 19 hereinafter “Regulation X,” as well as the Truth in Lending Act and implementing
 20 Regulation Z, (12 C.F.R. Part 1026) hereinafter “TILA.”

- 1 15. Defendant BAYVIEW LOAN SERVICING LLC ("Bayview" or Defendant
2 Bayview" hereinafter), is a Delaware Limited Liability Corporation doing
3 business in the State of California. Bayview has entered into an arrangement with
4 M&T Bank to perform servicing functions in connection with a number of
5 mortgage loans, including Plaintiff's mortgage loan.
- 6
- 7 16. Defendants were the agents, servants, partners, representatives, and/or employees
8 of co-Defendants, and in engaging in the actions mentioned below, were, unless
9 otherwise alleged, acting in concert with and within the course and scope of their
10 authority as such agent, servant, partner, representative, and/or employee with the
11 permission and consent of co-Defendants.
- 12
- 13 17. Any allegations about acts of any corporate or other business Defendants means
14 that the corporation or other business did these alleges acts through its officers,
15 directors, agents, representatives, and/or employee, while they were acting within
16 the actual or ostensible scope of their authority.
- 17
- 18 18. Defendant Bayview is operating from the City of Coral Springs, County of
19 Broward, State of Florida, and doing business in the State of California as the
20 agent or subservicer of M&T.
- 21
- 22 19. Defendant M&T is a company operating from the City of New York, County of
23 New York, State of New York, doing business in the State of California, by and
24 through its agent and/or "subservicer" Bayview.
- 25
- 26
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20. Defendant M&T, as the principal of Defendant Bayview, conducted business from the City of Coral Springs, County of Broward, State of Florida in the State of California.

21. Defendants did not originate Plaintiff's mortgage loan account and at the time the mortgage loan was assigned to Defendant M&T and Bayview for servicing, Plaintiff's mortgage loan account was in default. As such, Defendants qualify as "debt collectors" as that term is defined by 15 U.S.C. § 1692a(6).

22. Defendants are “servicers” as defined under RESPA 12 U.S.C.A. § 2605(i)(2),
“master servicers” and/ or “subservicers” as defined by 12 C.F.R. § 1024.33, and
Defendants are in the business of servicing loans across the country, including in
the State of California.

23. Plaintiff is informed and believes, and upon such information and belief alleges
Defendants service over 5,000 residential mortgage loans, including Plaintiff's.

24. Plaintiff is informed and believes, and upon such information and belief alleges,
that Defendants are not attorneys or counselors at law and are persons who, in the
ordinary course of business, regularly, on behalf of themselves or others, engages
in debt collection as that term is defined by California Civil Code § 1788.2(b).

Additionally, Defendants activities went beyond the scope of the ordinary foreclosure process since they engaged in debt collection activities. As such, Defendants are “debt collectors” as that term is defined by California Civil Code

§ 1788.2(c). Because this case involves a residential mortgage loan, this action arises out of a “consumer debt” and “consumer credit” as those terms are defined by Cal. Civ. Code § 1788.2(f).

FACTUAL BACKGROUND

Plaintiff's Pursuit of Foreclosure Prevention Alternatives

25. The Property is Plaintiff's principal residence, is owner-occupied and is a 1-to 4-family residential property.
 26. In 2006, Plaintiff entered into a written loan agreement and obtained a mortgage loan through Washington Mutual, FSB, in the amount of \$533,000 (the "Loan"), secured by the Property through a Deed of Trust (recorded on October 12, 2006), then and now the principal residence of Plaintiff. (See **Exhibit A**-“Plaintiff's Deed of Trust secured by the Subject Property”).
 27. Thereafter, JP Morgan Chase N.A. ("Chase" hereinafter) was assigned and/or purchased the Loan and serviced it until on or about November 2013, when Defendants acquired the servicing rights.
 28. Plaintiff performed dutifully under the Loan, until late 2009 when he fell behind on his mortgage payments. He applied to his mortgage servicer, Chase, for a mortgage modification in 2010.

- 1 29. During the application process, Chase recorded a notice of trustee sale, prompting
2 Plaintiff to retain counsel to challenge the propriety of the non-judicial foreclosure
3 of his home. Plaintiff and Chase eventually entered into a confidential settlement.
4
5 30. On or about November 2013, M&T Bank and Bayview acquired Plaintiff's Loan
6 from Chase and since that time, Defendants have acted as the servicer, master
7 servicer, and/or subservicer of Plaintiff's Loan.
8

9 **JP Morgan Chase Bank, N.A.'s Release of Plaintiff's Second Mortgage**

10 **Secured by the Property in 2013**

- 11 31. In connection with a settlement it reached with the federal government, Chase
12 notified Plaintiff on January 30, 2013 that it was cancelling the entire amount
13 owed on his second mortgage with Chase. (**Exhibit B**—"Letter from Chase waiving
14 Plaintiff's Obligation under the Second Mortgage").
15
16 32. As part of the settlement, Chase also recorded a Full Reconveyance and Notice of
17 Release of Obligation. (**Exhibit C**—"Chase's Full Reconveyance and Notice of
18 Release of Obligation").
19
20

21 **Defendants' Servicing and Acquisition of Plaintiff's Loan**

- 22 33. On October 31, 2013, Chase notified Plaintiff that **M&T** would begin servicing
23 Plaintiff's loan effective November 16, 2013. Chase's "Servicing Transfer Letter"
24 is attached hereto as **Exhibit D**.
25
26
27

1 34. Confusingly, Plaintiff subsequently received a letter from M&T dated November
2 18, 2013, (**Exhibit E**) stating that Chase assigned Plaintiff's loan to **Bayview**
3 **Loan Servicing LLC** as of November 16, 2013, but M&T would be responsible
4 for servicing the loan. Adding to this quagmire, Chase recorded a "California
5 Assignment of Deed of Trust" on January 3, 2014, purporting to grant, sell, assign,
6 transfer and convey the Deed of Trust, dated October 5, 2006, to Bayview.
7
8

9 35. On December 6, 2013, (attached hereto as **Exhibit F**), M&T sent Plaintiff a letter
10 advising that while M&T was responsible for servicing his loan, he should contact
11 Bayview regarding loss mitigation options.
12

13 **Plaintiff's Performance Under the Trial Payment Plan Offered by**
14 **Defendants**

15 36. By letter dated September 19, 2014, Bayview, on behalf of M&T, offered
16 Plaintiff a trial mortgage modification or trial period plan ("TPP" hereinafter) set
17 to run from November 1, 2014, to January 1, 2015, which required three monthly
18 TPP payments of \$2,014.30. Plaintiff timely made all three monthly TPP
19 payments.
20
21

22 **Plaintiff Accepted Defendants' Offer for a Permanent Loan Modification**

23 37. Bayview offered Plaintiff a Permanent Loan Modification in January 2015. The
24 cover letter of the package of modification documents explains the terms and
25 conditions of the modification. A true and correct copy of the Permanent Loan
26
27

1 Modification Letter with the Loan modification documents, dated January 21,
2 2015, is attached hereto as **Exhibit G** (hereinafter the “Modification Agreement”).
3
4

5 38. Included with the modification papers was a document titled “Return
6 Instructions.” Below the title is a condition stating that “MODIFICATION
7 AGREEMENT IS CONTINGENT ON RESOLVING PENDING LIEN AND OR
8 SUBORDINATION ATTACHED TO YOUR PROPERTY.” This contingency
9 was satisfied when Chase agreed to release its subordinate lien in 2013.
10
11

12 39. The letter also refers to the Modification Agreement. The Modification
13 Agreement states that the first monthly payment was due February 1, 2015. The
14 Modification Agreement reduces the interest rate to 2.0% and extends the term to
15 forty years, making the new maturity date of the loan January 1, 2055. The new
16 principal and interest payments are \$1,610.23 per month; and with escrow
17 included, the fully monthly payment starts at \$2,014.73.
18
19

20 40. Plaintiff accepted Bayview’s Permanent Loan Modification offer, extended by
21 Bayview on behalf of M&T, by signing and notarizing the Modification
22 Agreement, timely returning the signed documents to Bayview, and by making the
23 required payments to M&T, under the modified mortgage. The Modification
24 Agreement alters the terms of the mortgage for the remaining life of the loan.
25
26

27 41. Plaintiff made his first payment on his modified loan of \$2,014.73 on January 29,
28 2015 to M&T at the designated address for receiving monthly mortgage payments.
29

M&T accepted the payment and deposited the funds. However, M&T failed to properly credit Plaintiff's monthly payments in accordance with the new terms of the loan.

**Defendants' Failure to Update Plaintiff's Loan to Reflect the Terms of the
Loan Modification**

42. Despite Plaintiff's payment and performance under the Loan Modification and Chase's releasing its lien against the Property, Bayview sent Plaintiff a letter dated March 5, 2015, threatening to terminate the "Trial Period Plan" unless Chase's lien is satisfied or agrees to subordinate it.
43. On March 26, 2015, Plaintiff's counsel faxed a letter to Bayview notifying it that Chase released its lien in January of 2013.
44. Bayview's failure to respond prompted counsel to send a "Notice of Error" ("NOE") pursuant to 12 C.F.R. § 1024.35(b)(7)(11), dated June 19, 2015.
45. Bayview acknowledged receipt of the NOE in a letter dated July 1, 2015, and responded in a letter dated August 3, 2015, explaining that its letter requesting proof or subordination or satisfaction of Chase's lien should be disregarded. More importantly, the August 3, 2015, letter stated that "[t]he permanent loan modification, effective February 1, 2015, was fully converted on April 22, 2015."
46. On July 31, 2015, Plaintiff's counsel sent Bayview another NOE by certified mail (Certified Mail Number 7015 0640 0003 4818 0962), to Bayview's designated

1 mailing address to dispute fees erroneously assessed to his loan. A true and
2 correct copy of this NOE with the USPS.com tracking information sheet is
3 attached hereto as **Exhibit H**.
4

5 47. In the July NOE, Plaintiff challenged the “Miscellaneous Fee” of \$63.50.
6

7 48. Under 12 C.F.R. Section 1024.35(d), a mortgage servicer has five days
8 (excluding legal public holidays, Saturdays, and Sundays) to acknowledge
9 Plaintiff’s NOEs, in writing, and within thirty days (excluding legal public
10 holidays, Saturdays, and Sundays) to investigate the errors asserted, correct the
11 errors, and provide Plaintiff with a written response detailing the results of its
12 investigation.
13

14 49. However, Bayview failed to timely acknowledge receipt of the July 31, 2015,
15 NOE and respond within 30 days (excluding legal public holidays, Saturdays, and
16 Sundays).
17

18 50. Bayview finally replied on September 11, 2015. Bayview denied that any error
19 occurred stating that “[a]fter review, [Bayview] confirms all corporate advances
20 and fees for this account were assessed in accordance with all applicable
21 guidelines and have been deemed appropriate. All charges and fees assessed after
22 the modification were attributed to litigation.” (Attached hereto as **Exhibit I**
23 Bayview’s Response to Plaintiff’s NOE.
24
25
26
27
28

JOSEPH R. MANNING, JR., ESQ.
4667 MACARTHUR BLVD., STE. 150
NEWPORT BEACH, CA 92660

1 51. Had Bayview conducted a reasonable investigation, it would have discovered that
2 Plaintiff was not in active litigation with any entity, let alone Bayview and that the
3 “Miscellaneous Fee” was incorrect.
4

5 52. Getting nowhere with Bayview, Plaintiff’s counsel sent a NOE via Certified Mail
6 (Certified Mail tracking number 7015 0640 0003 4818 0979) on July 31, 2015 to
7 M&T to dispute the “Miscellaneous Fee.” (a true and correct copy of the July 31,
8 2015, NOE is attached hereto as **Exhibit J**).
9

10 53. The July NOE was sent to the M&T’s mailing address designated for NOEs:
11 M&T Bank, P.O. Box 62986, Baltimore, MD 21264-2986. Despite receiving the
12 NOE, M&T failed to acknowledge receipt and respond.
13

14 54. Despite Plaintiff’s months of timely payments on his modified loan, Defendants
15 treated the loan as if it were in default.
16

17 55. Plaintiff’s June 2015 mortgage statement states that he was over \$8,000 in arrears
18 on his loan and that his “account is currently in foreclosure.”
19

20 56. Plaintiff made every payment Defendants demanded of him since January 2015.
21 He has timely made every payment under the permanent modification he entered
22 into in January 2015, and should be current on his loan. Instead of bringing his
23 loan current, Defendants have unlawfully misapplied Plaintiff’s payments (e.g.
24 Plaintiff’s March 2015 payment was not credited to his loan until October 2015),
25
26
27

1 assessed various fees, including but not limited to default-related penalties,
2 attorney's fees, and property inspection fees.

3 57. Plaintiff has received and continues to receive default notices from Defendants.

4 Additionally, Defendants furnishes credit information on its customers to the three
5 national credit reporting agencies, Experian, Equifax, and Trans Union, LLC
6 ("CRAs").

7 58. As of July 30, 2015, rather than reporting Plaintiff was making payments as

8 agreed, Defendants reported to the three credit reporting agencies that Plaintiff
9 was increasingly late on his mortgage payments. From January 2015, when
10 Plaintiff became current on his mortgage, to the present, Defendants reported him
11 as being seriously delinquent on his mortgage.

12 59. As such, on August 26, 2015, Plaintiff's counsel sent another NOE to M&T via

13 certified mail (Certified Mail Number, 7015 0640 0001 9814 5098) (The NOE and
14 the USPS.com tracking information is attached hereto as **Exhibit K**). The August
15 26, 2015 NOE disputed the trade lines reflecting Plaintiff's loan was in default.

16 60. Defendant M&T received the NOE on September 1, 2015 but failed to timely

17 acknowledge receipt of the NOE and did not respond within the legally prescribed
18 time frame. In its letter, M&T contended that it had accurately reported Plaintiff's
19 loan to the credit agencies. To support its position, M&T attached a transaction
20 history which failed to accurately reflect Plaintiff's March 2015 payment.

61. Finally recognizing that an error occurred, Bayview sent Plaintiff a letter dated October 14, 2015, advising Plaintiff that his March 2015 payment was credited to his loan account on October 13, 2015. Included with this letter was a transaction history showing various default-related penalties, for which Bayview demanded immediate payment.

62. Defendants' failure to provide written acknowledgement of the NOEs and to timely investigate and correct the errors amounts to a pattern and practice of non-compliance with Regulation X (*See* 12 C.F.R. § 1024.35; *also see* 12 U.S.C.A. § 2605).

63. As a result of Defendants' perpetual harassment, Defendants' breaching their obligations to Plaintiff under the Agreement, illegally treating his loan as if it is in default, and their failure to investigate the errors asserted in Plaintiff's NOEs within the mandatory timeframe, and either correct the errors or provide a written explanation for why corrections are unnecessary, Plaintiff has suffered, and continues to suffer emotional distress and fears that Defendants will make good on their threat and foreclose on his home.

64. Defendants' outrageous conduct in treating the loan as in default and threatening to foreclose on the home while Plaintiff is current on his mortgage has frustrated Plaintiff's effort to rebuild his life and overcome his financial plight that began in

2009 and ultimately led Plaintiff to initiate this action to prevent Defendants from moving forward with foreclosure proceedings.

CAUSES OF ACTION

FIRST CAUSE OF ACTION: BREACH OF CONTRACT

(AS TO ALL DEFENDANTS)

65. Plaintiff incorporates by reference the preceding paragraphs of this Complaint as though fully set forth herein.
 66. Plaintiff has a valid contract with Defendants to modify his mortgage as of February 1, 2015, once he accepted by signing and notarizing the modification offer, returning it as instructed, and performing by making payments under the modification.
 67. Plaintiff performed all conditions precedent to the contract. In the alternative, Defendants waived any conditions precedent by accepting performance under the contract in the form of monthly payments.
 68. Plaintiff performed the obligations under the loan modification agreement. He fully performed his obligations by signing, notarizing, and returning the loan modification agreement, and making timely monthly payments in the amount required under the modification.
 69. The modification agreement obligated Defendants to bring the loan current, to accept payments as timely, and to credit them accordingly.

70. Plaintiff received the fully executed loan modification agreement on May 14, 2015, signed by Mark Churchill, on behalf of M&T Bank, by its Attorney in Fact, Bayview Loan Servicing, LLC. The fully executed loan modification agreement was dated and notarized by Defendants' agent, Mark Churchill on or about May 5, 2015, attached hereto and incorporated by reference as though set forth in full as **Exhibit L** ("Fully Executed Loan Modification Agreement").

71. Defendants breached the loan modification agreement by failing to bring the loan current, and by failing to properly credit Plaintiff's payments. Defendants further breached the modification agreement by attempting to collect and collecting amounts that were not due and owing under the modification agreement, including, without limitation, past due payments, interest, late fees, attorneys fees, and other default-related fees. Defendants also breached the Modification Agreement by characterizing the loan as in default and threatening nonjudicial foreclosure proceedings.

72. Defendants' breach of the Modification Agreement has caused Plaintiff damages in an amount to be proven at trial.

SECOND CAUSE OF ACTION

VIOLATIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT

(AS TO ALL DEFENDANTS)

73. Plaintiff incorporates by reference the preceding paragraphs of this Complaint as

1 though fully set forth herein.

2 74. 15 U.S.C. § 1692e prohibits a debt collector from making false, abusive, or
3 deceptive representations in connection with the collection of a consumer debt.
4

5 75. Beginning on or about February 1, 2015, and continuing to the present,
6 Defendants have engaged in the following conduct in violation of 15 U.S.C. §
7 1692e:
8

- 9 a. Defendants, in the course of debt collection activities, mischaracterized
10 the status of Plaintiff's loan as in default when it fact it was not;
11
12 b. Defendants, in the course of debt collection activities, attempted to collect
13 default-related fees when Plaintiff's loan was not in default; and
14
15 c. Defendants, in the course of debt collection activities, threatened to
16 foreclose on Plaintiff's home despite having no legal basis to do so.

17 76. As a result of Defendants' violations of the FDCPA, Plaintiff is entitled to any
18 actual damages, statutory damages in an amount up to \$1,000.00, and reasonable
19 attorney's fees and costs pursuant from Defendant.
20

21 ///

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28

COMPLAINT FOR DAMAGES AND EQUITABLE RELIEF

THIRD CAUSE OF ACTION

VIOLATIONS OF THE CALIFORNIA ROSENTHAL FAIR DEBT

COLLECTION PRACTICES' ACT

(California Civil Code Section 1788 et. seq)

(AS TO ALL DEFENDANTS)

77. Plaintiff incorporates by reference the preceding paragraphs of this Complaint as though fully set forth herein.

78. California Civil Code section 1788.17 prohibits a debt collector from engaging in false, abusive, or deceptive business practices in connection with the collection of a consumer debt.

79. Beginning on or about February 1, 2015, and continuing to the present, Defendants have engaged in the following conduct in violation of California Civil Code section 1788.17:

- a. Defendants, in the course of debt collection activities, mischaracterized the status of Plaintiff's loan as in default when it fact it was not;
 - b. Defendants, in the course of debt collection activities, attempted to collect default-related fees when Plaintiff's loan was not in default; and
 - c. Defendants, in the course of debt collection activities, threatened to foreclose on Plaintiff's home despite having no legal basis to do so;

1 80. As a result of Defendants' knowing or willful violations of the RFDCPA, Plaintiff
2 is entitled to any actual damages; statutory damages for a knowing or willful
3 violation in the amount up to \$1,000.00; and reasonable attorney's fees and costs.
4

5 **FOURTH CAUSE OF ACTION**

6 **VIOLATIONS OF THE TRUTH IN LENDING ACT ("TILA") 12 C.F.R.**

7 **1026.36(c)(1)(i)**

8 **(AS TO ALL DEFENDANTS)**

9 81. Plaintiff incorporates by reference the preceding paragraphs of this Complaint as
10 though fully set forth herein.
11

12 82. Since March 1, 2015 to the present, Defendant M&T failed to properly apply
13 Plaintiff's payments under the Modification Agreement to his loan, resulting in
14 default-related fees and M&T reporting negative credit information on Plaintiff's
15 credit file with the three credit reporting agencies.
16

17 83. Each of Plaintiff's payments qualified as periodic payments since each one was
18 sufficient to cover the principal, interest, and escrow for each given billing cycle.
19

20 84. Defendants' misconduct in this case, along with the numerous complaints filed with
21 the Consumer Financial Protection Bureau regarding Defendants' failure to
22 appropriately credit borrower's accounts with their monthly payments, demonstrates
23 a pattern and practice of non-compliance with Regulation Z such as to justify an
24 award of \$4,000 in statutory damages per violation. See
25

1 https://data.consumerfinance.gov/dataset/Consumer-Complaints/s6ew-h6mp
2

3 **FOURTH CAUSE OF ACTION**
4

5 **VIOLATIONS OF 12 C.F.R. § 1024.35 [RESPA]**
6

7 **(AS TO ALL DEFENDANTS)**
8

9 85. Plaintiff incorporates by reference the preceding paragraphs of this Complaint as
10 though fully set forth herein.
11

12 86. 12 C.F.R. Section 1024.35 prescribes that a mortgage servicer has five days
13 (excluding legal public holidays, Saturdays, and Sundays) to acknowledge
14 Plaintiff's NOEs, in writing, and within thirty days (excluding legal public
15 holidays, Saturdays, and Sundays) to investigate the errors asserted, correct the
16 errors, and provide Plaintiff with a written response detailing the results of its
17 investigation.

18 87. Defendants violated 12 C.F.R. Section 1024.35 in the following ways:
19

- 20 a. By failing to timely acknowledge receipt of Plaintiff's July 31, 2015 NOE
21 and correct the asserted errors within thirty-days;
22
23 b. By failing to conduct a reasonable investigation into the errors Plaintiff
24 asserted. Had Defendants done so, they would have corrected the errors by
25 removing the default-related fees assessed to the Loan after the permanent
26 modification took effect and not treat the loan as being in default.

27 88. Additionally, M&T violated 12 C.F.R. Section 1024.35 by:
28

- 1 a. By failing to timely acknowledge receipt and respond to Plaintiff's August
2 26, 2015 NOE and correct the asserted errors within thirty-days;
- 3 b. By failing to conduct a reasonable investigation into the errors Plaintiff
4 asserted. Had M&T done so, it would have corrected the errors on
5 Plaintiff's credit report, which reflected that the Loan was in default when
6 in fact, it was not.

7
8 9. Defendants misconduct in this case, along with the numerous complaints filed with
10 the Consumer Financial Protection Bureau regarding Defendants' failure to
11 acknowledge, investigate, and correct errors asserted by other borrowers
12 demonstrates a pattern and practice of non-compliance with the requirements of 12
13 U.S.C. §2605(f)(1) such as to justify an award of \$2,000 in statutory damages per
14 violation. See <https://data.consumerfinance.gov/dataset/Consumer-Complaints/s6ew-h6mp>.

15
16 **FIFTH CAUSE OF ACTION**

17
18 **DEMAND FOR ACCOUNTING**

19
20 **(AGAINST ALL DEFENDANTS)**

21
22 90. Plaintiff incorporates by reference the preceding paragraphs of this Complaint as
23 though fully set forth herein. The elements for a claim for accounting are: (i) a
24 fiduciary relationship or other circumstances appropriate to the remedy, and (ii) a
25

1 balance due from Defendants to Plaintiff that can only be ascertained by an
2 accounting.

3 91. Defendants have held themselves out to be Plaintiff's creditors and mortgage
4 servicers. As a result of this purported relationship with Plaintiff, Defendants
5 have a duty to Plaintiff to properly account for payments made by Plaintiff.
6 Moreover, a fiduciary relationship between the parties is not required to state a
7 claim for accounting. All that is required is that some relationship exists that
8 requires an accounting.

9 92. The mortgage contract between Defendants and Plaintiff allows Defendants to
10 pay for default-related services when necessary or appropriate, and to be
11 reimbursed by the borrowers, but it does not authorize Defendants to mark-up the
12 actual cost of those services to make a profit, nor does it allow Defendants to incur
13 unnecessary fees if Plaintiff is not actually in default.

14 93. Since the permanent modification went into effect on February 1, 2015, Plaintiff
15 has timely paid on his loan. As such, any default-related service fees incurred by
16 Defendants were unnecessary and not sanctioned by the Modification Agreement.

17 94. Any claimed arrearages were a result of these improper fees.

18 95. It would be inequitable and unconscionable for Defendants to benefit from these
19 illegal fees.

20 96. The actual amount of the arrearages on Plaintiff's loan and the actual amount of

1 money due from Defendants to Plaintiff, and vice versa, is unknown to Plaintiff
2 and cannot be ascertained without an accounting of the receipts and disbursements
3 of the these transactions.
4

5 **PRAYER**

6 **WHEREFORE, Plaintiff prays for judgment against each Defendant, jointly
7 and severally, as follows:**

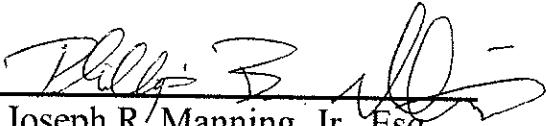
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- 9 1. For damages sustained by Plaintiff due to Defendants' wrongful acts in excess of
10 the jurisdictional limits in an amount to be proven at trial;
- 11 2. For enforcement of the terms of the Loan Modification;
- 12 3. For disgorgement of all monies acquired by Defendants by means of any act or
13 practice declared by this Court to be wrongful;
- 14 4. For interest on the sum at the rate of 10% per annum;
- 15 5. For all relief granted under California Civil Code §2924.12(b);
- 16 6. For reasonable attorney's fees and costs of suit, as allowed by both state and
17 federal law, and all other relief granted under Civil Code §2924.12(i);
- 18 7. For recovery of statutory damages under TILA of \$4,000.00 per violation of
19 TILA;
- 20 8. For recovery of statutory damages under RESPA of \$2,000.00 per violation of
21 RESPA;
- 22 9. For such other and further relief as this Court deems just and appropriate.
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2 **TRIAL BY JURY**
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4 Pursuant to the Seventh Amendment to the Constitution of the United
5 States of America, Plaintiff is entitled to, and does hereby demand, a trial by jury.
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7 Dated: November 25, 2015
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10 **MANNING LAW OFFICE**
11 **A PROFESSIONAL CORPORATION**
12

13 By: 
14

15 Joseph R. Manning, Jr., Esq.
16 Michael Manning, Esq.
17 Phillip B. Nghiem, Esq.
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